

STATE OF MICHIGAN
IN THE SUPREME COURT

TEDDY 23, LLC, a Michigan limited
liability company, and MICHIGAN TAX
CREDIT FINANCE, LLC, a Michigan
limited liability company d/b/a MICHIGAN
PRODUCTION CAPITAL,

Plaintiffs/Appellants,

v

MICHIGAN FILM OFFICE and
MICHIGAN DEPARTMENT OF
TREASURY,

Defendants/Appellees.

Supreme Court No. 153420 & 153421

Court of Appeals No. 323299 & 323424

Ingham Circuit Court No. 14-702-AA &
Court of Claims No. 14-39-MT

**MICHIGAN DEPARTMENT OF TREASURY'S BRIEF IN OPPOSITION TO
PLAINTIFFS / APPELLANTS' APPLICATION FOR LEAVE TO APPEAL**

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Under the Revenue Act, the Court of Claims has subject-matter jurisdiction over challenges to Treasury's assessments, decisions, and orders. But under the Revised Judicature Act in conjunction with the Court of Claims Act, the circuit courts have exclusive jurisdiction over appeals from of administrative agency decision. Here, Teddy 23 and Lender challenge a decision of the Michigan Film Office, an administrative agency. Does the Court of Claims lack subject-matter jurisdiction over Teddy 23 and Lender's appeal of a Michigan Film Office decision under both the Revenue Act and the Court of Claims Act?

Appellants' answer: No.

Appellees' answer: Yes.

Trial court's answer: Yes.

Court of Appeals' answer: Yes.

2. There is no right to a late appeal of an agency decision. A circuit court has discretion over whether to grant or deny a late application for leave to appeal and may consider the length and reason for the delay. Teddy 23 and Lender filed an application for leave to appeal a Michigan Film Office decision nearly six months late, alleged another court had jurisdiction over the appeal, and blamed the Film Office and Treasury for its failure to file their appeal on time. Did the circuit court abuse its discretion in not granting the late application for leave to appeal?

Appellants' answer: Yes.

Appellees' answer: No.

Trial court's answer: No.

Court of Appeals' answer: No.

3. Equity applies only in the absence of a specific statutory mandate. The Administrative Procedure Act, Revised Judicature Act, and Court Rules provide the means and requirements for appealing an agency decision. Does equity demand the equitable remedy of allowing Teddy 23 and Lender to proceed with their appeal in the circuit court where they failed to follow the specific statutory provisions for properly filing an appeal or in the Court of Claims absent subject-matter jurisdiction?

Appellants' answer: Yes.

Appellee's answer: No.

Trial court's answer: The Courts below did not answer this question.

Court of Appeals' answer: No.

4. The Due Process Clause prohibits the government from depriving a person of life, liberty, or property without due process of law. The Michigan Legislature provides a means by which an aggrieved party may challenge an agency decision, but Teddy 23 and Lender failed to properly file an appeal. The Equal Protection Clause requires that persons under similar circumstances be treated alike, but Teddy 23 and Lender fail to demonstrate that they were treated differently than similarly situated production companies under similar circumstances. Were Teddy 23 and Lender's constitutional rights violated as a matter of law?

Appellants' answer: Yes.

Appellees' answer: No.

Trial courts' answer: Not addressed.

Court of Appeals' answer: Not addressed.

STATUTES AND RULES INVOLVED

MCL 205.22

(1) A taxpayer aggrieved by an assessment, decision, or order of the department may appeal the contested portion of the assessment, decision, or order to the tax tribunal within 35 days, or to the court of claims within 90 days after the assessment, decision, or order. The uncontested portion of an assessment, order, or decision shall be paid as a prerequisite to appeal.

MCL 600.6419

(5) This chapter does not deprive the circuit court of exclusive jurisdiction over appeals from the district court and administrative agencies as authorized by law.

MCL 600.631

An appeal shall lie from any order, decision, or opinion of any state board, commission, or agency, authorized under the laws of this state to promulgate rules from which an appeal or other judicial review has not otherwise been provided for by law, to the circuit court of the county of which the appellant is a resident or to the circuit court of Ingham county, which court shall have and exercise jurisdiction with respect thereto as in nonjury cases. Such appeals shall be made in accordance with the rules of the Supreme Court.

MCR 7.105

(G) Late Appeal.

(1) When an appeal of right or an application for leave was not timely filed, the appellant may file an application as prescribed under subrule (B) accompanied by a statement of facts explaining the delay. The answer may challenge the claimed reasons for the delay. The circuit court may consider the length of and the reasons for the delay in deciding whether to grant the application.

**COUNTER-STATEMENT OF JUDGMENT /
ORDER APPEALED FROM AND RELIEF SOUGHT**

Plaintiffs-Appellants, Teddy 23, LLC (Teddy 23) and Michigan Tax Credit Finance d/b/a Michigan Production Capital (Lender), request leave to appeal the published Michigan Court of Appeals' opinion issued on December 15, 2015, in *Teddy 23, LLC and Michigan Tax Credit Finance, LLC d/b/a Michigan Production Capital v Michigan Film Office and Michigan Department of Treasury* (Docket No. 323299) and *Teddy 23, LLC and Michigan Tax Credit Finance, LLC d/b/a Michigan Production Capital v Michigan Film Office and Michigan Department of Treasury* (Docket No. 323424) attached as Ex A (hereinafter "Op".)

Defendant-Appellee, Department of Treasury respectfully requests that this Court deny Plaintiffs-Appellants' application based on the comprehensive analysis contained in the Court of Appeals' opinion and for the reasons set forth below.

REASONS FOR DENYING THE APPLICATION

This is a case about litigants who failed to follow the plain language of the Revenue Act, the Court of Claims Act, Revised Judicature Act, and the Michigan Court Rules by filing in the wrong court *and* too late, and now cry foul at the injustice created by their own errors. There are two straight-forward issues of legal procedure arising out of Teddy 23 and Lender's attempts to challenge a Michigan Film Office denial of a post-production certificate of completion in Michigan courts. The first is whether the Court of Claims has subject-matter jurisdiction over an appeal of a Film Office decision. The second is whether the Ingham County Circuit Court erred in denying an untimely application for leave to appeal a Film Office decision. The answers to both questions are no.

The Court of Appeals rightly recognized that the Department of Treasury and Michigan Film Office are separate entities and that the Film Office, and not the Department of Treasury, issued the decision denying the request for a post-production certificate of completion. The Court of Appeals correctly held that neither the Revenue Act nor the Court of Claims Act confers the Court of Claims with subject-matter jurisdiction over Teddy 23 and Lender's appeal. The Court of Appeals also correctly held that Teddy 23 and Lender failed to show that the circuit court's decision denying their late application for leave was the result of an abdication of discretion.

The legal position that forms the crux of Teddy 23 and Lender's application is grounded on the false proposition that the Department of Treasury and the Film Office are one and the same. The Department of Treasury and the Michigan Film

Office are distinct entities. The Revenue Act is not applicable to Film Office decisions. And as a result, the arguments in the application that relate to the Revenue Act lack logic and merit. Teddy 23 and Lender also blame the Film Office and the Department of Treasury for their decision to file their appeal in the Court of Claims, instead of the Ingham County Circuit Court as they warned they would. But such accusations are neither factually accurate nor legally relevant. Teddy 23 and Lender seek to overturn the Court of Appeals' decision based on nothing more than (1) a non-existent conflict between the Court of Appeals' decision and a decision of this Court; (2) an incorrect characterization of the issues as ones of first impression; (3) misplaced notions of estoppel; and (4) misguided applications of constitutional concepts.

This application for leave to appeal does not warrant this Court's review under MCR 7.305(B) for the reasons that:

- The validity of the Revenue Act itself is not at issue in this case. Thus, this case does not involve substantial questions about the validity of any legislative act.
- This case does not present issues of first impression. Based on statutory mandate and case law, it is clear that the Court of Claims does not have subject-matter jurisdiction over this case. See MCL 600.6419(5) (circuit courts have exclusive jurisdiction over decisions from administrative agencies); *Bays v Dep't of State Police*, 89 Mich App 356, 362-363 (1979); *Michigan Film Coalition v State of Michigan, Department of Treasury*, (8/21/2012 Docket No. 304000 unpublished op, Ex B).
- The Film Office, an entity distinct from Treasury with the decision-making authority to grant or deny post-production certificates of completion, issued the decision denying Teddy 23's request for a post-production certificate of completion. Because there is no challenge to a Treasury decision, the Revenue Act is not applicable to this case. Moreover, the accusations that Teddy 23 and Lender were somehow mislead about how to appeal the

Michigan Film Office decision are not factually accurate and not legally relevant as subject-matter jurisdiction over a judicial proceeding is an absolute requirement, and it cannot be conferred by consent, conduct, waiver, or estoppel. *In re AMB*, 248 Mich App 144, 166 (2001). Teddy 23 and Lender's failure to properly file an appeal of a Film Office decision is not of significant public interest.

- An appeal of a Michigan Film Office's denial of a request for a post-production certificate of completion is not likely to occur again as neither the Film Office nor the film credit exist as they did when the lower courts issued their opinions below. Effective July 10, 2015, there is no Michigan film credit. Accordingly, the issues in this case do not involve any legal principles of major significance to state jurisprudence.
- The Court of Appeals' decision is not clearly erroneous and is in no way contrary to this Court's opinion in *Fradco v Department of Treasury*, 495 Mich 104 (2014), a case that dealt with notice requirements under the Revenue Act (which does not apply to the Film Office) and that did not involve subject-matter jurisdiction.

For those reasons, this Court should deny leave to appeal.

COUNTER-STATEMENT OF FACTS

The Failed Scar 23 Production

Teddy 23 was a production company, whose principals were Luc Campeau and Philippe Martinez. Teddy 23 entered into a Film Production Incentive Agreement with the Film Office, with the Treasurer's concurrence, in connection with the film "Scar 23." (Treasury's COA Br, Ex A.) The Agreement set forth the maximum value of a film credit that *could* be approved subject to verification of the project's actual Michigan production expenses and economic benefit to the State. (Treasury's COA Br, Ex A.) Lender was one of the financiers of the film.

Scar 23 was slated to be action film shot with real actors in real locations. But the production gradually shifted to a special-effects / computer-generated-

imagery film. (Appellants' COA Br, Ex 18.) The Scar 23 production had financing problems from the beginning. (First Am Compl, ¶¶ 104-109.) Teddy 23 ceased production of Scar 23 in April 2011, and the film was never completed. (First Am Compl, ¶109.) Thereafter, the principals of Teddy 23 turned over their tax credit application to Lender.

Request for post-production certificate of completion from the Film Office

In May 2011, a request for a post-production certificate of completion seeking a tax credit of over \$4.5 million dollars for the unfinished film was submitted to the Film Office. (Appellants' COA Br, Ex 16.) The request included an "independent audit" report on direct production expenditures and qualified personnel expenditures as required by statute. (Appellants' COA Br, Ex 16, Attachment A, 2.) The "independent audit" report did not include a review the financial statements of related parties Maxar (computer-generated-imagery vendor) and Cinepro (Teddy 23's parent company). (Appellants' COA Br, Ex 16, Attachment A, 2.)

Treasury assisted the Film Office in evaluating the request and audit report principally by certified public accountant, attorney and Treasury administrative law specialist, Sara Clark Pierson¹ in accordance with 208.1455(5).

Review of request for post-production certificate of completion and audit

The review of the request and audit materials submitted by Teddy 23 revealed that the Scar 23 production was less than 50% complete, many employees

¹ Ms. Pierson is misidentified as an "Investigator" in the application. (Treasury COA Br, Pierson Aff, Ex B.)

and unrelated vendors were unpaid, and that Teddy 23 and its related companies had left Michigan and abandoned their financial records. (Appellants' COA Br, Ex 18.) In addition, there was an unexplained funding gap of \$4.3 million dollars, meaning that Teddy 23 claimed to have spent over \$10.7 million dollars in Michigan, but only showed sources of cash including loans and other investments totaling \$6.4 million dollars. (Appellants' COA Br, Ex 18.) Also, nearly 90% of Teddy 23's expenditures were made to companies owned by family members of the owner of Teddy 23. (Appellants' COA Br, Ex 18.) As a result, Teddy 23 was asked to provide bank statements that would identify the sources of the cash deposits. Initially, only redacted bank statements were provided. It took Teddy 23 and Lender 11 months to provide un-redacted bank statements, which delayed completion of the audit. (Appellants COA Br, Ex 18.)² At the conclusion of the review, Treasury made two suggestions to the Film Office:

Although we recommend denying the entire tax credit because of fraud, we have reviewed all the expenditures on the Post Production Certificate Request to determine actual expenditures if the Film Office rejects our recommendation

If the entire tax credit is not disallowed for fraud, we recommend reducing the gross credit for Teddy 23, LLC from \$4,509,582 to \$1,327,181. This reduction is based on our review of expenditures. (Appellants' COA Br, Ex 18, p 1-2.)

In other words, based on the documentation submitted in support of the request for a post-production certificate of completion, Treasury proposed two recommendations

² The allegation on pp 11 -12 that Teddy or Lender were not asked to provide any additional documentation or information during the review is not true.

to the Film Office: reduce the gross credit or disallow the entire credit sought on the basis of fraud.

The Film Office denied a post-production certificate of completion

The Film Office denied Teddy 23's request for approval of its post-production certificate of completion in its entirety on July 18, 2013. (Appellants' COA Br, Ex 17.)

Thereafter, attorneys for Teddy 23 and Lender requested a meeting with the Film Office and Treasury to discuss the denial letter. (Treasury's COA Br, Pierson Aff, Ex B.) Representatives from Treasury and the Film Office agreed, and a meeting was held on August 14, 2013, with Teddy 23's and Lender's attorneys, principals from Lender, the Film Commissioner, Treasury's Director of Executive Operations, and Ms. Pierson in attendance. (Treasury's COA Br, Ex B.) In communications with the Film Office and Treasury, Teddy 23 and Lender's counsel advised the Film Office and Treasury that they had a 60-day window to appeal the Film Office decision and would take an appeal in the circuit court if the dispute could not be resolved. (Treasury's COA Br, Ex B.) Later, Treasury and the Film Office representatives again met with Teddy 23 and Lender's attorneys and representatives, at Teddy 23 and Lender's request, to discuss why the post-production certificate of completion was denied. No Treasury attendees made representations regarding jurisdiction or appeal periods. (Treasury's COA Br, Ex B.) Teddy 23 and Lender's attorneys requested that the Film Office reissue the denial of the credit on at least two occasions indicating that they planned to file an appeal in the circuit court. (Treasury's COA Br, Ex B.) The Film Office complied

and re-issued a denial letter on October 14, 2013, and again on December 11, 2013. (Appellants' COA Br, Ex 17.)³

In the denial letter dated December 11, 2013, the Film Commissioner states that in its review of the expenditures, there "is evidence that there was an intentional submission of information that appears to be false and fraudulent with a fact pattern that would lead us to believe that the information was known to be false and fraudulent. The result of this is a full denial of the certificate application." (Appellants' COA Br, Ex 17.) The letter goes on to state "any rights of appeal begin as of December 11, 2013, the date of this notice." (Appellants' COA Br, Ex 17.)

PROCEEDINGS BELOW

The Court of Claims and Ingham County Circuit Court find in favor of the Film Office and Department of Treasury

On February 10, 2014, Teddy 23 and Lender filed a seven-count complaint in the Court of Claims contesting the Film Office's December 11, 2013 denial of their request for a post-production certificate of completion. This complaint was never served on Treasury or the Film Office.

On March 24, 2014, Teddy 23 and Lender filed an amended complaint, alleging "this matter is an original action contesting the Film Office's actions." (First Am Compl, ¶18.) Teddy 23 and Lender also alleged that the Court of Claims had jurisdiction to hear its appeal of the Film Office's decision under MCL

³ The Department of Treasury did not issue or re-issue a letter denying the request for a post-production certificate of completion, nor did it have the statutory authority to grant or deny a request for a post-production certificate of completion. The allegation on page 14 of the application to the contrary is not true.

208.1315, MCL 205.22, MCL 600.6419, MCL 24.301 – MCL 24.306 and article VI, § 28 of Michigan’s 1963 Constitution (First Am Compl, ¶21.) The Amended Complaint included seven counts: Count I – Plaintiffs have complied with Section 455; Count II – Defendant Film Office conclusion of fraud is meritless as a matter of law and fact; Count III – Malfeasance of the Film Office in relying on Treasury’s recommendation; Count IV – Misfeasance of Film Office for failing to timely process request; Count V – Constructive Fraud of Treasury in connection with Teddy 23’s preparation of its certificate of completion; Count VI – denial of Equal Protection of the law in connection with Teddy 23’s preparation of its certificate of completion; and Count VI⁴ – denial of Due Process connection with Teddy 23’s preparation of its certificate of completion. The amended complaint was served on the Department of Treasury on April 8, 2014.

The Film Office moved for summary disposition on April 22, 2014. Treasury also moved for motion for summary disposition in a motion filed in lieu of an answer on April 23, 2014 under MCR 2.116(C)(4) asserting a lack of subject-matter jurisdiction and under MCR 2.116(C)(7) asserting claims against Treasury were barred under governmental immunity.

On June 10, 2014, six weeks after the State defendants moved for summary disposition in the Court of Claims, Teddy 23 and Lender filed a late application for leave to appeal the Michigan Film Office’s December 11, 2013 denial letter in the Ingham County Circuit Court. On June 16, 2014, the parties submitted a

⁴ There were two Count VIs.

stipulation to hold the late application in abeyance pending the resolution of the motions pending in the Court of Claims. On this same day, the circuit court denied the late application noting that the order was final under MCR 2.602(A)(3). (Appellants' COA Br, Ex 2.) The stipulation was signed on June 20, 2014. Thereafter, Teddy 23 and Lender moved for reconsideration.

While the motion for reconsideration was pending, Teddy 23 and Lender filed a motion to file supplemental exhibits and information in the Court of Claims consisting of the filings and orders issued in connection with their late application in the Ingham County Circuit Court.

The Ingham County Circuit Court denied Teddy 23 and Lender's motion for reconsideration in an order dated July 29, 2014, because they did not present any new issues and did not demonstrate a palpable error which mislead the court or parties and which would result in a different disposition. (Appellants' COA Br, Ex 3.)

The Court of Claims granted Teddy 23 and Lender's motion to file supplemental exhibits and information and accepted the additional documents on August 4, 2014. On August 11, 2014, the Court of Claims issued its opinion and order granting Treasury and the Film Office summary disposition under MCR 2.116(C)(4). (Appellants' COA Br, Ex 1.) Because the Court of Claims ruled it lacked subject-matter jurisdiction, it did not address whether Teddy 23 and Lender's claims are barred under governmental immunity or whether they failed to

comply with notice requirements of the Court of Claims Act. An appeal to the Court of Appeals followed.

The Court of Appeals affirmed

The Court of Appeals affirmed the lower court decisions in a published opinion. As to the Court of Claims case, the Court of Appeals rightly rejected Teddy 23 and Lender's position that the Film Office and the Department of Treasury are the same entity because such a position "ignores the nature relationship between the Michigan Strategic Fund, the Michigan Film Office and the Department of Treasury." (Op, p 5.) The opinion goes on to say that while Film Office was located within the Strategic Fund and housed with Treasury strictly for administrative purposes, by statute it "was legally required to and exercised its powers independent from the Department." (Op, p 5.) Accordingly, the Court of Appeals affirmed this case did not involve a challenge to a Treasury assessment, decision, or order and therefore, the Court of Claims correctly concluded that it lacked subject-matter jurisdiction under the Revenue Act. (Op, p 5.) The Court of Appeals also rejected Teddy 23 and Lender's position that the Court of Claims Act conferred subject-matter jurisdiction to the Court of Claims based on the exclusionary language in MCL 600.6419(5), which expressly excludes appeals from administrative agencies. (Op, p 5-6.)

As to the circuit court, the Court of Appeals held that Teddy 23 and Lender failed to show that the decision denying their delayed application for leave to appeal was the result of an abuse of discretion. (Op, p 7.) In so concluding, the Court of Appeals rejected the two bases upon which Teddy 23 and Lender alleged error,

including their argument that they were misled to believe the Court of Claims had jurisdiction over their appeal. (Op, p 6.) The Court of Appeals held that the circuit court's decision was based on a consideration of the issues notwithstanding the lack of specific analysis on the initial order. (Op, p 7.) The Court of Appeals also noted that the six week delay between the filing of the motions for summary disposition in the Court of Claims and the filing of the delayed application in Ingham Circuit weakened the position that they had acted with diligence. (Op, p 7.) Finally, the Court of Appeals rejected Teddy 23 and Lender's argument that they were entitled to their day in court under theories of estoppel, noting that even if a valid estoppel argument existed, subject-matter jurisdiction cannot be conferred by estoppel. (Op p, 7-8.)

Teddy 23 and Lender moved for reconsideration, which the Court of Appeals denied. They have now filed an application with this Court.

ARGUMENT

I. The Court of Claims lacks subject-matter jurisdiction over appeals of Michigan Film Office decisions.

A decision on summary disposition and a trial court's interpretation of a statute is reviewed *de novo*. *Guardian Envtl Serv's v Bureau of Constr Codes & Fire Safety*, 279 Mich App 1, 6 (2008); *Willett v Waterford Charter Twp*, 271 Mich App 38, 45 (2006).

When interpreting a statute, courts should “give effect to the Legislature’s intent, focusing first on the statute’s plain language.” *Malpass v Dep’t of Treasury*, 494 Mich 237, 247-248 (2013). When the words of a statute are unambiguous, the Court must enforce them as written and no further judicial construction is permitted. *Id.* at 249.

A. Teddy 23 was denied a post-production certificate of completion, not a film credit.

In 2008, the Legislature created the film credit to encourage investment in the State’s film industry. MCL 208.1101 et seq.⁵ To obtain this credit, a company had to (1) invest and spend at least fifty-thousand dollars in the State, (2) become approved as a qualified entity and enter into an agreement with the Michigan Film Office, (3) receive a post-production certificate of completion from the Michigan Film

⁵ The Michigan Business Tax Act was repealed by Public Act 39 of 2011. The former film Credit has been replaced with the Michigan Film and Digital Media Production Assistance Program, MCL 125.2029h. The film credit provision has been amended numerous times. The cited provisions reflect the statutory language in effect during the time of the submission and review of the request for a post-production certificate of completion.

Office and (4) submit the certificate of completion to the Department of Treasury. MCL 208.1455(1).

The roles of the Film Office and Treasury were set by statute. The Act specified that the Treasurer must concur with the Film Office's decision to enter into a Film Production Tax Credit Agreement with the eligible production company. MCL 208.1455(1). Each agreement set forth a maximum value of a tax credit that *may* be issued to the eligible production company subject to verification of the actual Michigan production expenses. MCL 208.1455(2). Once the production was complete, a qualified production company would submit a request for post-production certificate of completion to the Film Office, along with information and any independent certification deemed necessary by the Film Office or Treasury. MCL 208.1455(5).

The Film Office reviewed and processed the requests within 60 days unless it required additional information, but was not under any obligation to issue a post-production certificate of completion until it was satisfied that the claimed expenditures were adequately established. MCL 208.1455(5). If the Film Office granted the request and issued a post-production certificate of completion, the eligible production company could submit the post-production certificate of completion to Treasury along with its tax return. MCL 208.1455(7). The eligible production company had to file a tax return with Treasury to claim the refundable⁶

⁶ This was a "refundable" credit because the credit was not limited to just offsetting a tax liability, but instead an eligible production company received a state-funded payment to the extent the credit exceeded any tax owed.

credit. Treasury was required to refund the amount of the credit as set forth on the post-production certificate of completion over any liability that was owed. MCL 208.1455(7).

In this case, Teddy 23's request for a post-production certificate of completion was denied by the Film Office. No post-production certificate of completion was issued. No post-production certificate of completion was presented to Treasury. No MBT tax return was filed. The Court of Claims and the Court of Appeals correctly concluded that the decision subject to appeal was the Film Office's denial of a post-production certificate of completion.

B. The Revenue Act does not give the Court of Claims subject-matter jurisdiction over Film Office decisions.

Under the Revenue Act, “a *taxpayer* aggrieved by an *assessment, decision, or order* of the department may appeal the contested portion of the assessment, decision, or order to the Court of Claims within 90 days after the assessment, decision, or order.” MCL 205.22(1) (emphasis added). The Revenue Act defines “department” as the “department of Treasury.” MCL 205.1(3)(a). Accordingly, the Court of Claims only has subject-matter jurisdiction over assessments, decisions, or orders of the Department of Treasury. The Revenue Act does not confer subject-matter jurisdiction to the Court of Claims over Teddy 23 and Lender's appeal for the simple reason that there is no Treasury assessment, decision, or order at issue.

While it is true that Treasury administers the Michigan Business Tax, the Legislature limited Treasury's authority as it relates to the Film Production Credit Act in MCL 208.1513, MCL 208.1455(1) & (5). Under this statutory scheme,

Treasury was authorized *only* to concur with the agreement between the eligible production company and the Film Office, to request and review information submitted by the eligible production companies, and to refund the excess of the credit over the eligible production company's tax liability or pay the amount of the credit in accordance with the post-production certificate of completion issued by the Film Office. MCL 208.1455(1),(3), (5) & (7). According to statute, *only* the Film Office was authorized to grant or deny a request for a post-production certificate of completion. MCL 208.1455(5). Consistent with this statutory scheme, Treasury reviewed the records submitted by Teddy 23 and Lender and recommended two potential courses of action to the Film Office, to issue a reduced credit or to deny the credit in full. (Appellants' COA Br, Ex 18.) The Film Commissioner decided to deny the credit in full. (Appellants' COA Br, Ex 17.)

Following its records review, Treasury made two recommendations to the Film Office. Treasury did not and could not grant or deny a request for a post-production certificate of completion. The only statutory "action" Treasury was authorized to take was to issue the tax credit. But Treasury could not issue a tax credit without Teddy 23 first obtaining a post-production certificate of completion from the Film Office and filing a MBT return with Treasury claiming a film credit. The Film Office did not grant the post-production certificate of completion and Teddy 23 never filed a MBT return. Thus, there was not and could not be a Treasury decision.

The Revenue Act does not afford subject-matter jurisdiction to the Court of Claims over Teddy 23 and Lender's appeal. Their arguments to the contrary are unavailing.

1. The Film Office and Treasury are not one and the same.

In their amended complaint, Teddy 23 and Lender named both the Michigan Film Office and Department of Treasury as party defendants and made allegations distinct to each party defendant. (First Am Compl.) And they contested the Film Office's actions. Specifically, they alleged that the December 13, 2013 letter from the Film Office is the final "decision" or "order" that they contest – not a decision or order of Treasury. (First Am Compl, ¶16.)

But, after the Court of Claims dismissed the appeal based on a lack of subject-matter jurisdiction, Teddy 23 and Lender changed course and began arguing that the Film Office and Treasury are the same entity. Indeed, throughout their application Teddy 23 and Lender refer to the Film Office and the Department of Treasury collectively as "the Department." In fact, this position now forms the foundation of their argument that the Court of Claims has jurisdiction over their appeal under the Revenue Act as well as their arguments regarding the Taxpayer Bill of Rights, notice and the alleged conflict with this Court's decision in *Fradco v Dep't of Treasury*, supra. But, this position is belied by the plain language of the Michigan Strategic Fund Act and the film credit statute.

At all times relevant to this case the Film Office was an entity within the Michigan Strategic Fund (MSF). MCL 125.2029a(1)⁷. And the MSF was a “public body corporate and politic” and an “autonomous entity” within the Department of Treasury⁸. MCL 125.2005(1). However, its “powers, duties, and functions” were exercised independently from the Department. MCL 125.2005(1). Moreover, the Legislature defined separate duties and responsibilities to the Film Office and to the Department of Treasury in MCL 205.1455, as discussed above. Indeed, throughout MCL 205.1455, the terms “office” and “department” are referred to separately further indicating the two are separate entities.

As the Court of Appeals correctly recognized, Teddy 23 and Lender’s position ignores the relationship and duties of the Film Office, the MSF and the Department of Treasury as defined by statute. (Op, p 5.) The Court of Appeals went on to state:

The MSF and MFO were housed within the Department strictly for administrative purposes pursuant to the requirement that each agency of the administrative branch of state government be allocated within not more than twenty principle departments. Const 1963, art 5, §2. But as far as substantive decision making of the sort involved in this appeal was concerned, the MSF and, by extension, the MFO were legally required to operate independent of the Department. Indeed, the MSF and MFO have since been allocated to another principal department of state government, illustrating the fact that the MFO is not and never was equivalent to the Department. (Op, p 5.)

⁷ The Michigan Film Office is now known as the Michigan Film & Digital Media Office and the film credit no longer exists. Op, p 2, fn 1, 3, MCL 125.2029h(1).

⁸ As of December 18, 2014, the MSF is now administratively housed in the Department of Talent and Economic Development. Executive Order No. 2014-12.

The Film Office and Department of Treasury were separate. The Film Office was not Treasury's sock puppet as Teddy 23 and Lender argued to the Court of Appeals.

2. Arguments regarding the Taxpayer Bill of Rights and notice requirements are red herrings.

The Revenue Act in conjunction with due process provides a multitude of safeguards for taxpayers as set forth by statute and case law, including notice requirements, pre-deprivation hearings, and post-deprivations hearings. See MCL 205.21–22. Teddy 23 and Lender seek protections and rights under the Revenue Act despite the fact that there is no Treasury assessment, decision, or order in this case. In this sense, Teddy 23 and Lender argue that they are in the same position as if the Film Office granted their request for a post-production certificate of completion, they possessed a certificated credit, they filed a MBT return claiming a film credit, and Treasury denied the credit. But they are not, because none of these things happened. Without a Treasury assessment, decision, or order, the requirements of the Revenue Act are not triggered. For this reason, the provisions of MCL 205.5 and case law relating to the Revenue Act notice requirements are inapplicable to this case.

Consistent with MCL 205.5, Treasury publishes a brochure entitled “Taxpayer Rights Handbook” that explains Treasury's tax billing, audit guidelines and collection guidelines and explains the informal and formal appeals process. (Appellants' COA Br, Ex 22.) This is a publicly available informational brochure that does not take the place of law (plainly expressed in the handbook itself).

Neither the Revenue Act nor the handbook provide information regarding the appeal processes for challenging decisions of other State agencies and departments. The Legislature does not require Treasury to provide appeal processes for challenging other State agencies and departments under MCL 205.5.

Moreover, in its effort to convince this Court that the Taxpayer Bill of Rights is applicable to this case, Teddy 23 and Lender suggest that Treasury conducted an audit of its tax liability, instead what really happened, which was merely a review of the materials it submitted in support of its request for a post-production certificate of completion. (Application, p 21.) There was no audit of Teddy 23 or Lender's Michigan Business Tax liability. Teddy 23 never filed a MBT return, nor did Treasury ever conduct an audit of its MBT tax liability or assess any tax under the MBT Act. The only "actions" of Treasury in connection with the post-production certificate of completion request were the review of documentation provided by Teddy 23 and Lender and making suggestions to the Film Office consistent with MCL 205.1455.

This case and *Fradco v Department of Treasury*, supra, involve distinct factual and legal issues. The issue on appeal in *Fradco* involved notice. Indeed, in *Fradco* there was no dispute that the Revenue Act conferred the Tax Tribunal with subject-matter jurisdiction over the taxpayer's appeal of a Treasury assessment of tax. The issue on appeal in *Fradco* was the manner in which Treasury notified the taxpayer of its assessment of tax and how that impacted the time to appeal begins to run. More specifically, the issue was whether Treasury met its notice

requirements by mailing a final assessment to the last known address of the taxpayer as required by MCL 205.28(1)(a) or whether MCL 205.8 expands Treasury's notice requirements to include service upon the Taxpayer's representative. This Court held that if a taxpayer had appointed a representative, Treasury must send the assessment of tax to both the taxpayer and its representative to trigger the running of the appeal period. *Fradco*, 495 Mich at 117-118. This case, in contrast, is about subject-matter jurisdiction, not about Treasury's failure to serve a taxpayer's representative a copy of a tax assessment. This case does not even involve a Treasury assessment, decision, or order, let alone how Treasury served a notice of its assessment, decision, or order. Teddy 23 and Lender's allegation that the Court of Appeals decision conflicts with this Court's opinion in *Fradco* is false.

Teddy 23 and Lender misplace reliance on the Revenue Act's notice requirements and the taxpayer handbook is irrelevant to issues in this case. Because the decision upon which they seek review is not an assessment, decision or order of Treasury, the Court of Claims lacks subject-matter jurisdiction over Teddy 23 and Lender's appeal under the plain language of the Revenue Act. The Court of Claims correctly concluded that it lacks subject matter over Teddy 23 and Lender's appeal under the Revenue Act. The Court of Appeals did not err.

C. The Court of Claims Act does not give the Court of Claims subject-matter jurisdiction over Film Office decisions.

Under the Court of Claims Act, the Court of Claims is conferred with exclusive jurisdiction to:

hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers *notwithstanding another law that confers jurisdiction of the case in the circuit court*. [MCL 600.6419(1)(a) (emphasis added).]

MCL 600.6419(5) provides that the exclusive grant of jurisdiction to the Court of Claims does not deprive the circuit court of “exclusive jurisdiction over appeals from . . . administrative agencies as authorized by law.” MCL 600.631 provides that the circuit courts have jurisdiction over appeals from “any order, decision or opinion of any state board, commission, or agency,” unless judicial review has otherwise been provided for by law. Moreover, this Court has held that the jurisdictional provisions of the Court of Claims Act cannot be construed as to deprive circuit courts of jurisdiction over review of state agency determinations. See *Bays v Dep’t of State Police*, 89 Mich App 356, 362-363 (1979).

The Film Office is an administrative agency, and there is no specific statutory procedure for appealing a Film Office denial of a post-production certificate of completion. Thus, according to the plain language of MCL 600.6419(1)(a) & (5), and MCL 600.631, the Court of Claims lacks jurisdiction to review a decision of an administrative agency.

Teddy 23 and Lender fail to acknowledge the clear statutory mandate in MCL 600.6419(5) that circuit courts have exclusive jurisdiction over agency decisions. The Court of Appeals correctly concluded that the Court of Claims Act did not confer the Court of Claims with subject-matter jurisdiction over the appeal

and that the Court of Claims did not err by dismissing the appeal for lack of subject-matter jurisdiction.

II. The Ingham County Circuit Court did not abuse its discretion in denying Teddy 23 and Lender’s late application for leave to appeal the Film Office decision.

A circuit court’s decision to dismiss an appeal is reviewed for an abuse of discretion. See *Smith v Merrill Lynch Pierce Fenner & Smith*, 155 Mich App 230, 234 (1986). An abuse of discretion occurs when the court choses an outcome that “falls outside the range of reasonable and principled outcomes.” *People v Babcock*, 469 Mich 247, 269 (2003).

The Court of Appeals addressed each of Teddy 23 and Lender’s allegations of error and correctly concluded that the circuit court did not engage in any abdication of discretion when it denied the delayed application.

A. Teddy 23 and Lender failed to show good cause for their late application.

There are three potential avenues in which judicial review of an administrative agency decision may be sought: (1) review pursuant to a procedure specified in a statute applicable to the particular agency, (2) the method of review for contested cases under the Administrative Procedures Act (APA), MCL 24.201 *et seq*; MSA 3.560(101) *et seq.*, or (3) an appeal pursuant to § 631 of the Revised Judicature Act, MCL 600.631; MSA 27A.631, and article 6, § 28 of Michigan’s 1963 Constitution, in conjunction with MCR 7.104(A). See *Hopkins v Parole Bd*, 237 Mich App 629, 632 (1999); *Pontiac Food Ctr v Dep’t of Community Health*, 282 Mich App 331, 335 (2008) (emphasis added).

There is no a specific procedure for appealing a denial of a request for a film credit post-production certificate of completion set forth by statute. The APA provides for judicial review only for a contested matter in the circuit court for the county where petitioner resides or has his or her principal place of business in this state, or in the circuit court for Ingham County within 60 days of the final decision or order of the agency. See MCL 24.301 – 24.304. As the Court of Appeals noted, no evidentiary hearing was held, so an appeal under the APA was not available to Teddy 23 and Lender. (Op, p 6.)

Under the RJA, appeals of administrative decisions must be filed in the circuit court for the county where the petitioner resides or in the circuit court for Ingham County. MCL 600.631. MCR 7.104(A) provides that an appeal of right to the circuit court must be taken within twenty-one days or the time allowed by statute after entry of the judgment, order or decision appealed. The time limit for an appeal of right is jurisdictional. Similarly, MCR 7.105(A) provides that an application for leave to appeal may be filed with the clerk of the circuit court within twenty-one days or the time allowed by statute after entry of the judgment, order or decision appealed. Under MCR 7.105(G)(1), an appellant may file an application for leave to appeal when an appeal of right or an application for leave is not timely filed. The appellant must provide a statement of facts explaining the delay. MCR 7.105(G)(1) further provides that the circuit court may consider the length and the reasons for the delay in deciding whether to grant the application. A late

application may not be filed more than six months after the order, judgment or decision appealed. MCR 7.105(G)(2).

Teddy 23 and Lender filed their application for leave to appeal the Film Office's December 11, 2013 denial letter on June 10, 2014. In its statement of jurisdiction and explaining the delay in filing, Teddy 23 and Lender assert that they timely and properly filed their appeal in the Court of Claims. (Delayed Application, p 5.) They go on to state that the delayed application was filed to preserve their right to appeal in case the Court of Claims granted Treasury and the Film Office summary disposition based on a lack of subject-matter jurisdiction. (Delayed Application, p 6.) Teddy 23 and Lender made no affirmative declaration of the circuit court's jurisdiction over their appeal. As far as explaining the delay in filing in the circuit court, Teddy 23 and Lender blamed Treasury and the Film Office.

At the time of the filing, the appeal was late by many months, and was just one day shy of the six month cut-off for late filings. Further, as the Court of Appeals recognized Teddy 23 and Lender filed their application more than six weeks *after* Treasury and the Film Office filed their motions arguing that the Court of Claims lacked subject-matter jurisdiction over their appeal, which weakens their argument that they acted with any sort of diligence. (Op p, 7.)

Teddy 23 and Lender do not have a right to take an untimely appeal. Whether to grant an untimely appeal is a matter of grace left to the circuit court's discretion under MCR 7.105. Under MCR 7.105(G) a circuit court may consider the length of and the reasons for the delay in deciding whether to grant the application.

The length of the delay – a day before the absolute cut-off – certainly weighed in favor of a denial. Further, if there was any confusion as to where to file, Teddy 23 and Lender could have timely filed their appeal in both the Court of Claims and the Ingham County Circuit Court in order to secure their rights.

Denying the application based on the statement of jurisdiction and reasons for the delay provided by Teddy 23 and Lender was not unreasonable and not beyond the range of reasonable outcomes.

B. The circuit court did not abuse its discretion by denying the delayed application on a SCAO-Approved Form.

While the Court Rules provide that a circuit court may consider the length and reasons for the delay in deciding to grant the application, there is no requirement that the circuit court provide an explanation for denying an application for leave to appeal under MCR 7.105(G)(1). SCAO approved Form CC299, entitled “Order on Application for Leave to Appeal,” utilized by the judge in this case is consistent with the Court Rules. There are two boxes on the form that state the appellant’s application for leave to appeal is “granted” or “denied.” The judge may check one to rule on the application. In this instance the “denied” box was checked. (Appellants’ COA Br, Ex 2.) Nothing more was required by Form CC299 or the Court Rules. The circuit court did not abuse its discretion by using Form CC299.

C. The circuit court was aware of, considered and appropriately rejected Teddy 23 and Lender’s arguments in favor of allowing their delayed appeal.

Even if an explanation was required, it was provided in the circuit court’s order denying Teddy 23 and Lender’s motion for reconsideration. The order

confirms that the circuit court considered and rejected the reasons cited in the application regarding the applicable criteria for denying or granting a late application – the length and reason for the delay. As the Court of Appeals correctly found, the circuit court did appropriately consider the issues involved as set forth in the order denying reconsideration:

Although the court did not provide any specific analysis with its denial, plaintiffs' filed a motion for reconsideration, which the court stated it denied because it concluded that the motion merely presented the same issues already ruled on. This indicates the circuit court was familiar with the issues in plaintiff's delayed application, even if it did not explain its analysis on the denial form. (Op, p 7.)

Teddy 23 and Lender do not provide any proof that the circuit court was unaware of or did not consider the arguments they made in their delayed application. To the contrary, the circuit court order denying reconsideration expressly states it did. (Appellants' COA Br, Ex 2.)

D. The denial of Teddy 23 and Lender's late application for leave to appeal does not violate their constitutional rights.

Teddy 23 and Lender assert that the Circuit Court's denial of their application deprives them of their right to due process in that it precludes an appeal and that the Court of Appeals erred by not addressing this issue. (Application, p 36-37.) This is not true as there has been no denial of due process.

The Legislature set forth the means by which an agency decision may be appealed. Here, Teddy 23 and Lender failed to follow statutory law and court rules by not filing a timely appeal in the proper court. As such, they put themselves in a position in which they had to convince the circuit court to accept their late appeal

because there is no right to a late appeal under MCR 7.105. They were not successful. This is not a denial of a constitutional right, but rather an example of a case that was not properly prosecuted.

Teddy 23 and Lender fail to demonstrate that the circuit court's denial of their application was an abuse of discretion.

III. Equity follows the law and does not require that Teddy 23 and Lender be allowed to maintain an appeal of the Film Office decision in the Court of Claims or the circuit court

A. Jurisdictional requirements are set by law, and not by State employees.

Subject-matter jurisdiction over a judicial proceeding is an absolute requirement, and it cannot be conferred by consent, conduct, waiver, or estoppel. *In re AMB*, 248 Mich App 144, 166 (2001); *In Re Return of Forfeited Goods*, 452 Mich 659, 670 (1996). Yet, Teddy 23 and Lender want this Court to *give* the Court of Claims subject-matter jurisdiction over its claims absent statutory authority because of prior film credit litigation and because Treasury has “agreed” or “waived” subject-matter jurisdiction in the past. Teddy 23 and Lender also claim that Treasury improperly “advised” their counsel how to appeal a Film Office decision. These arguments are neither factually accurate nor grounded in law.

1. A position taken in previous litigation does not give the Court of Claims subject-matter jurisdiction over Film Office decisions under the theory of judicial estoppel.

There has been a range of litigation related to film credits. Prior to its demise, the film credit statute was amended several times, which resulted in changes in the statutory duties of Treasury and the Film Office. Litigants have

challenged statutory language itself, the process set forth by the Legislature by which a credit can be obtained, the application process, denials of post-production certificates of completion (like in this case), and denials of a credits claimed by production companies on MBT returns (not like this case). As a result, and based on the nature of the appeal, subject-matter jurisdiction *could* be conferred in different courts based on different jurisdictional statutes regarding different aspects of the statute.

Teddy 23 and Lender feign confusion about where to challenge a Film Office decision in part because Treasury has taken positions contrary to that of this case. Such allegations are not true. The Department of Treasury has not advocated a position or agreed that the Revenue Act confers subject-matter jurisdiction to the Court of Claims over a Film Office decision denying a request for a post-production certificate of completion. In its application, Teddy 23 and Lender cite to two appellate cases involving the film credit statute, *Sandy Frank Productions LLC v Michigan Film Office*, 2012 WL 12752 (ED Mich, Jan 4, 2012) (Appellants' COA Br, Ex 4) and *Michigan Film Coalition v Department of Treasury, et al*, (8/21/2012 Docket No. 304000 Unpublished Op, Ex B), but misrepresent both cases in several respects. (Application, p 29.)

The *Sandy Frank Productions LLC* case was filed in the United States District Court for the Eastern District of Michigan. The defense's motion to dismiss argued that if the film credit was issued by the Film Office (which it was not), then the resolution of state tax issues (the decision not to grant the tax credit upon

presentment of an approved certificate from the Film Office) would be proper in the Court of Claims under the Revenue Act. (Appellants' COA Br, Ex 4, motion to dismiss, p 2.) The court dismissed the case finding defendants were entitled to Eleventh Amendment immunity and because it was filed in an improper venue (the action giving rise occurred in the Western District). The court did not reach jurisdictional issues. (Appellants' COA Br, Ex 4, p 3-4.)

The States' position in *Sandy Frank* is consistent with this case. A Treasury decision to deny a film tax credit claimed on a MBT return filed with Treasury and upon presentment of an approved post-production certificate of completion from the Film Office *could* be properly in the Court of Claims under the Revenue Act. But since there is no decision by Treasury and Teddy 23 and Lender challenge a decision of the Film Office, the Court of Claims does not have jurisdiction under the Revenue Act.

Like *Sandy Frank Productions, LLC*, the *Michigan Film Coalition* case did not involve a challenge to a Film Office denial of a post-production certificate of completion. Rather, the case arose from an inquiry from a voluntary unincorporated association of commercial film producers to Treasury as to whether commercials produced in Michigan would be eligible for the film credit. The association never applied for a tax credit. Treasury responded in writing that the commercials were not eligible according to the plain language of the statute. The association filed a lawsuit in the circuit court seeking declaratory judgment, and the

circuit court ruled that aspects of the statute related to commercials were nonsensical.

On appeal, Treasury argued that the circuit court lacked subject-matter jurisdiction over the declaratory action seeking an interpretation of the statute. But the *Michigan Film Coalition* panel held it did. (Ex B, pp 2-3.) The panel reasoned that since Treasury's letter did not constitute a decision, order, or assessment, it did not fall under the Revenue Act and the case was properly brought in the circuit court. (Ex B, pp 2-3.) Implicit in the panel's reasoning is the notion that the association never filed a request for the credit, so there was no decision by Treasury to deny the credit. The instant case similarly does not involve an "assessment, decision or order" of Treasury. Even if counsel for Treasury and the Film previously misinterpreted the law and advocated a different position, which it did not, a party is not entitled the continued misinterpretation of law. *Lear Corp v Dep't of Treasury*, 299 Mich App 533 (2013), citing, *Syntex Laboratories v Dep't of Treasury*, 233 Mich App 286, 293 (1998).

Teddy 23 and Lender also argue that Treasury has acquiesced or waived subject-matter jurisdiction in a number of cases involving the film credit statute filed in the Court of Claims. (Application p, 29.) As noted above, litigants have challenged statutory language itself, the process set forth by the Legislature by which a credit can be obtained, the application process, denials of post-production certificates of completion, and denials of a credits claimed by production companies on MBT returns. Teddy 23 and Lender do not at all address the nature of the cases.

Notwithstanding, the contention that Treasury waived subject-matter jurisdiction in any of these cases is simply not accurate. Even if that were factually true, which it is not, a waiver of subject matter would be impossible because subject-matter jurisdiction cannot be waived. In fact, subject-matter jurisdiction can be raised at any time – even on appeal. Moreover, there is no special preservation requirement for a challenge to a court’s subject-matter jurisdiction, and the challenge may be raised for the first time on appeal. *McFerren v B & B Investment Group*, 233 Mich App 505, 511-512 (1999); see also MCR 2.116(D)(3). The fact that previous cases involving challenges to aspects of the film credit process were filed in the Court of Claims and later resolved is meaningless.

Subject-matter jurisdiction cannot be established in this case based on positions Treasury has or has not taken in previous litigation.

2. State Departments and employees cannot give the Court of Claims jurisdiction over challenges to a Film Office denial of a post-production certificate of completion.

Teddy 23 and Lender and their attorneys were not misguided or misinformed regarding the applicable appeal period or appropriate court in which to challenge a Film Office decision. (Treasury’s COA Br, Ex B.) To the contrary, the denial letters from the Film Commissioner state that “any rights of appeal begin as of . . . the date of this notice.” (Appellants COA Br, Ex 17.)

Teddy 23 and Lender claim that Treasury employee Sara Clark Pierson determined *and then* advised them that that the correct appeal period was 60 days *and then* they relied on such advice. (Application, pp 13-14, 30-32.) This is not true. After the Film Office issued its denial letter, counsel for Teddy 23 and Lender

requested a meeting with the Film Office and Treasury to discuss the denial and to request more time to appeal. The Film Office and Treasury complied with such requests – on multiple occasions.

Ms. Clark Pierson never advised Teddy 23 or Lender or their counsel regarding the proper court to pursue an appeal or the amount of time they had to file an appeal. (Treasury's COA Br, Ex B.) To the contrary, it was Teddy 23 and Lender's counsel who proclaimed that they had a 60-day appeal window to challenge the denial and intended to file suit in the circuit court. (Treasury's COA Br, Ex B.) The January 14, 2014 email from Sara Clark Pierson to Teddy 23 and Lender's counsel does not state any filing deadlines or appellate procedures for challenging the post-production certificate of completion denial. The only thing this email shows is a Treasury employee's willingness to schedule a meeting within Teddy 23 and Lender's own self-determined 60-day appeal window despite being out of State on a pre-planned vacation. Apparently, in dealings with Teddy 23 and Lender no good deed goes unpunished.

Further, a 60-day appeal period is consistent with an appeal to the circuit court, not to the Court of Claims. The Revenue Act provides that a taxpayer has 90 days to appeal an order or decision of Treasury in the Court of Claims versus a 21 day appeal under the APA or 60-day appeal under the RJA. Treasury lacks the authority to shorten the 90-day appeal period established by the Legislature.

Neither Teddy 23, nor Lender nor their attorneys were misled about how to appeal the Film Office decision. Notwithstanding, subject-matter jurisdiction

cannot be conferred on a court by consent of the parties. Nor would such misguidance trump the statutes and court rules that govern appeals from administrative decisions.

B. Equitable estoppel does not provide a remedy for a litigant's failure to follow statutory provisions and Court Rules.

Equitable estoppel is an “equitable defense that prevents one party to a contract from enforcing a specific provision contained in the contract.” *Morales v Auto-Owners Ins Co*, 458 Mich 288, 295 (1998). For equitable estoppel to apply, the party seeking its application must establish that: (1) a party, by representations, admissions, or silence intentionally or negligently induced another party to believe facts, (2) the other party justifiably relied and acted on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts. *West Am Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 310 (1998).

The doctrine of equitable estoppel is wholly inapplicable to this case for several reasons. As a preliminary matter, Teddy 23 and Lender do not establish the elements of equitable estoppel. Teddy 23 and Lender allege that Treasury gave them *legal* advice on how to file their appeal – not *facts*. There are no inducements of *facts* upon which another party relied to its detriment. More importantly, equity only applies in the absence of a specific statutory mandate. See *Stokes v Millen Roofing Co*, 466 Mich 660, 672 (2002). “[I]t is not [a court’s] place to create an equitable remedy for a hardship created by an unambiguous, validly enacted, legislative decree.” *Id.*, quoting *Stokes v Millen Roofing Co*, 245 Mich App 44, 58 (2001).

In this case, through the Revised Judicature Act and Court Rules the Legislature indicates the proper court in which to file and the proper time in which to file an appeal of a Film Office decision. Even if the statutes are difficult to follow, difficulty in understanding a statute does not give anyone the right to not follow a statute. Teddy 23 and Lender failed to follow the rules governing appeals of agency decisions. They are not entitled to an extra opportunity to maintain their appeal in the under the auspices of equity. As the Court of Appeals ruled, even if equitable estoppel could be applied in this case, that fact alone does not compel a reversal of the Court of Claims and Circuit Court. (Op, p 7-8.)

IV. Teddy 23 and Lender's constitutional challenge fails as a matter of law.

Neither the Court of Claims nor the Circuit Court reached the constitutional claims made by Teddy 23 and Lender. Appellate review is generally limited to issues that were decided by the trial court below. *Bowers v Bowers*, 216 Mich App 491 (1996). And as a result, these issues were not properly before the Court of Appeals. Thus, the Court of Appeals did not err by not addressing these issues. Notwithstanding, the arguments fail because Teddy 23 and Lender's constitutional rights have not been violated in any way.

A. Teddy 23 and Lender's procedural due process rights were not violated.

Both the Michigan Constitution and the United States Constitution preclude the government from depriving a person of life, liberty, or property without due process of law. The principle of fundamental fairness is the essence of due process. *By Lo Oil Company v Dep't of Treasury et al*, 267 Mich App 19; 28-30 (2005). Due

process is a flexible concept, however, and determining what process is due in a particular case depends on the nature of the proceeding, the risks and costs involved, and the private and governmental interest that might be affected. *Id.* Due process is satisfied when a taxpayer has “a fair opportunity to challenge the accuracy and legal validity of their tax obligation [and] a ‘clear and certain remedy’ for any erroneous or unlawful tax collection to ensure the opportunity to contest the tax is a meaningful one.” *Id.*

While the collection of a tax constitutes a deprivation of property, no collection of tax took place in this instance as Teddy 23 and Lender suggest. The issue in this case is whether the Film Office properly denied the request for a post-production certificate of completion. The Film Production Incentive Agreement set forth the maximum credit value that may be issued after the completion of the project, subject to verification of the actual production expenses. Teddy 23 was required to prove that all of their expenditures meet the statutory requirements. Teddy 23 and Lender did not meet this burden and as a result, the Film Office could not grant their request for a post-production certificate of completion. Without a post-production certificate, Teddy 23 and Lender could not claim and Treasury could not grant a film credit. Regardless, due process is satisfied because the Michigan statutory scheme provides an opportunity to challenge agency decisions.

Teddy 23 and Lender’s own actions created the injury to which they seek redress. They closed the courthouse doors on themselves when they failed to

properly appeal the Film Office's denial of their request for a post-production certificate of completion in circuit court.

B. Teddy 23 and Lender were not denied equal protection of the law.

Equal protection of the law is guaranteed by both the federal and Michigan constitutions. *Brinkley v Brinkley*, 277 Mich App 23, 35 (2007). The purpose of equal protection is to ensure every person against intentional and arbitrary discrimination, whether occasioned by the express terms of a statute or by its improper execution. *Village of Willowbrook v Olech*, 528 US 562, 564 (2000). The equal protection guarantee requires that persons under similar circumstances be treated alike, but there is no requirement that persons under different circumstances be treated the same. *El Souri v Dep't of Social Servs*, 429 Mich 203, 207 (1987). Proper application of the law cannot be considered a constitutional violation. See *Syntex Laboratories v Dep't of Treasury*, 233 Mich App 286, 293 (1998). A plaintiff bears the burden of establishing that Treasury "failed to treat similarly situated enterprises equally and that its failure to do so was intentional and knowing, rather than mistaken and the result of inadvertence." *Lear Corp v Dep't of Treasury*, 299 Mich App 533, 538 (2013), citing *Armco Steel Corp v Dep't of Treasury*, 419 Mich 582, 592 (1984). Treasury is "only required to show a rational basis for its decision." *Id.*

Teddy 23 and Lender claim that Treasury and the Film Office's guidelines for independent audits do not require that third-party vendors' financial statements be

audited unless the vendor is operating under a production services agreement. Based on this, they claim that their independent auditor did not review third-party vendors' financial statements and that their request for a post-production certificate of completion was denied because the third-party vendor's financial statements were not reviewed. In other words, they claim that they were created unfairly because they were required to audit third-party vendors, but other eligible production companies did not have to. But, this argument fails on several fronts.

First, this is not what happened at all. The vendors to which Teddy 23 and Lender refer as "third-parties"—Maxsar and Cinepro and virtually all of the other vendors—have the same owners, the same address, the same office, and the same bookkeeper as Teddy 23. (Appellants' COA Br, Ex 18.) They are not really third-parties. Keeping this in mind, the principals of Teddy 23 argue that because of Treasury, their independent auditor failed to review the financial statements of their other companies that would have revealed the funding gap and misstatement of expenditures that formed the basis of the Film Office's denial. They make the claim even though they had day-to-day control over the finances of most all vendors and abandoned their vendor records. (Appellants' COA Br, Ex 18.)

Second, family ties can motivate families to conduct transactions outside of normal business terms and conditions. This is why the America Institute of CPAs (AICPA) standards required the more than eleven companies involved in the production who were related by blood or marriage to be audited. When third-party transactions involve people who are family members, the AICPA professional

conduct standards, specifically AU-C Section 550, require the auditor to give additional scrutiny to the transactions.⁹ This is because the nature of related party relationships and transactions may, in some circumstances, give rise to higher risks of material misstatement of the financial statements than transactions with unrelated parties.

Teddy 23 and Lender were unable to provide information that the Film Office or Treasury may deem necessary to verify the claimed expenditures and eligibility for a credit and submitted false and fraudulent information. As a result, the Film Office denied their request for a post-production certificate of completion under MCL 208.1455(5). Teddy 23 and Lender were treated the same as other taxpayers under similar circumstances who failed to substantiate their request for a post-production certificate of completion. There was no unequal protection of the law.

⁹ AU Section 555:

<http://www.aicpa.org/Research/Standards/AuditAttest/DownloadableDocuments/AU-C-00550.pdf>.

CONCLUSION AND RELIEF REQUESTED

This case does not warrant this Court's consideration. The Court of Appeals did not err in affirming that neither the Revenue Act nor the Court of Claims Act provides the Court of Claims with subject-matter jurisdiction over Teddy 23 and Lender's appeal of a Michigan Film Office decision according to their plain language. The Court of Appeals likewise did not err in finding the Ingham County Circuit Court did not abuse its discretion in denying Teddy 23 and Lender's delayed application for leave to appeal. Because the Court of Appeals did not err, this Court should deny leave.

Respectfully submitted,

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